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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

PAUL RECKTENWALD,

Case No. 3:15-cv-00187-RCJ-VPC

Petitioner,

ORDER

v.

DWIGHT NEVEN, et al.,

Respondents.

This counseled habeas matter under 28 U.S.C. § 2254 comes before the court on respondents' motion to dismiss petitioner Paul Recktenwald's second-amended petition (ECF No. 99). Recktenwald opposed (ECF No. 102), and respondents replied (ECF No. 107).

I. Procedural History and Background

On October 24, 1997, a jury found Recktenwald guilty of counts 1-2, 6-10: sexual assault of a child under 16 years of age; counts 3, 11-15: statutory sexual seduction; counts 4-5: possession of a controlled substance; and count 16: kidnapping (exhibit 111).¹ At sentencing, the state district court set aside the statutory sexual seduction counts as lesser included offenses, pursuant to *Meador v. State*, 711 P.2d 852 (Nev. 1985). On February 10, 1998, the state district court adjudicated Recktenwald a habitual criminal and sentenced him to a term of life without the possibility of parole, among other sentences. Exh. 120. Judgment of conviction was filed on February 12,

¹ Exhibits referenced in this order are exhibits to respondents' first motion to dismiss, ECF No. 35, and are found at ECF Nos. 36-46.

1 1998. Exh. 122. The Nevada Supreme Court affirmed the convictions on January 25,
2 2000, denied Recktenwald's petition for rehearing and petition for rehearing en banc,
3 and remittitur issued on May 5, 2000. Exhs. 150, 154, 156, 159.

4 On December 6, 2000, Recktenwald filed a proper person state postconviction
5 petition for writ of habeas corpus. Exh. 185. The state district court appointed nine
6 different attorneys to represent petitioner; only one moved to withdraw for a reason
7 other than a breakdown of the attorney-client relationship. See exh. 240. On August
8 11, 2011, Recktenwald's ninth appointed counsel filed a supplemental state
9 postconviction petition. Exh. 223. On March 21, 2013, the state district court denied
10 the petition. Exh. 240. On April 10, 2014, the Nevada Supreme Court issued an order
11 of limited remand, directing the state district court to enter an order with specific findings
12 of fact and conclusions of law. Exh. 265.

13 On June 6, 2014, the state district court issued its order denying Recktenwald's
14 petition. Exh. 268. On November 3, 2014, the Nevada Supreme Court affirmed the
15 denial of the petition, denied a petition for rehearing and a petition for rehearing en
16 banc, and remittitur issued on April 17, 2015. Exhs. 273, 276, 281, 282.

17 Recktenwald dispatched his federal petition for mailing on or about March 25, 2015
18 (ECF No. 5). This court appointed counsel (ECF No. 67). Respondents now move to
19 dismiss the counseled, second-amended petition on the bases that the claims are
20 unexhausted, procedurally barred and/or noncognizable in federal habeas corpus (ECF
21 No. 99).

22 **II. Legal Standards & Analysis**

23 **a. Exhaustion**

24 State prisoners seeking federal habeas relief must comply with the exhaustion rule
25 codified in § 2254(b)(1):

26 An application for a writ of habeas corpus on behalf of a person in custody
27 pursuant to the judgment of a State court shall not be granted unless it
28 appears that –

- 1 (A) The applicant has exhausted the remedies available in the court so the
2 State; or
3 (B) (i) there is an absence of available State corrective process; or
4 (ii) circumstances exist that render such process ineffective to protect the
5 rights of the applicant.

6 The purpose of the exhaustion rule is to give the state courts a full and fair
7 opportunity to resolve federal constitutional claims before those claims are presented to
8 the federal court, and to "protect the state courts' role in the enforcement of federal law."
9 *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844
10 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
11 unexhausted until the petitioner has given the highest available state court the
12 opportunity to consider the claim through direct appeal or state collateral review
13 proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v.*
14 *McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

15 A habeas petitioner must "present the state courts with the same claim he urges
16 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
17 constitutional implications of a claim, not just issues of state law, must have been raised
18 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481
19 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court
20 must be "alerted to the fact that the prisoner [is] asserting claims under the United
21 States Constitution" and given the opportunity to correct alleged violations of the
22 prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v.*
23 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)
24 "provides a simple and clear instruction to potential litigants: before you bring any claims
25 to federal court, be sure that you first have taken each one to state court." *Jiminez v.*
26 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520
27 (1982)). "[G]eneral appeals to broad constitutional principles, such as due process,
28 equal protection, and the right to a fair trial, are insufficient to establish exhaustion."
Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However,

1 citation to state caselaw that applies federal constitutional principles will suffice.
2 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

3 A claim is not exhausted unless the petitioner has presented to the state court the
4 same operative facts and legal theory upon which his federal habeas claim is based.
5 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
6 exhaustion requirement is not met when the petitioner presents to the federal court facts
7 or evidence which place the claim in a significantly different posture than it was in the
8 state courts, or where different facts are presented at the federal level to support the
9 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*
10 *v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,
11 458 (D. Nev. 1984).

12 **Ground 1**

13 Recktenwald alleges that the trial court allowed introduction of evidence of prior
14 bad acts in violation of his Fifth, Sixth, and Fourteenth Amendment rights to due
15 process and a fair trial (ECF No. 98, pp. 13-15). Specifically, he argues that the trial
16 court improperly allowed testimony from various witnesses, without any hearing or
17 evidence to support it, that: (1) Recktenwald was previously charged with the rape of
18 M.H. (the alleged victim in this case); (2) that he habitually ran a methamphetamine lab;
19 and (3) that he was a convicted murderer. He also claims that after the trial court held a
20 hearing pursuant to *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985), the court allowed into
21 evidence (4) testimony from M.H.'s sister Leslie Holmes that she (the sister) had sex
22 with Recktenwald because her mother told her to do so as rent payment; and (5)
23 testimony from Linda Baumgartner that approximately 17 years ago Recktenwald had
24 molested her when she was 11 years old. *Id.*

25 Respondents argue that, while Recktenwald presented these factual allegations
26 in his direct appeal, he did not present the alleged improper admission of these prior
27 bad acts as a federal constitutional violation (ECF No. 99, pp. 6). Recktenwald argues
28

1 that he federalized this claim in his direct appeal by citing to Nevada and federal case
2 law regarding the introduction of prior bad acts (ECF No. 102, pp. 11-14). However,
3 while Recktenwald cited to Nevada and federal cases that discussed the application of
4 state law governing the admission of evidence and the Federal Rules of Evidence, he
5 did not invoke federal constitutional provisions in his direct appeal. Exh. 126, pp. 7-11;
6 *Ybarra*, 678 F. Supp. at 1481; *Duncan*, 513 U.S. at 365. Accordingly, ground 1 is
7 unexhausted.

8 **Ground 2**

9 Recktenwald contends that the trial court allowed inadmissible expert witness
10 testimony, inadmissible hearsay testimony, and excluded Recktenwald's impeachment
11 evidence, in violation of his Fifth, Sixth and Fourteenth Amendment rights to due
12 process and a fair trial (ECF No. 98, pp. 15-18). He contends that state expert witness
13 Elizabeth Ritchitt improperly attested to M.H.'s truthfulness. He argues that the trial
14 court allowed the state to introduce inadmissible hearsay evidence, including two
15 transcripts of M.H.'s statements to sheriffs and the entire preliminary hearing transcript.
16 Finally, he claims that the trial court improperly denied the admission of a letter written
17 by state witness Charles Moore in which he offered to testify against multiple fellow
18 inmates in return for favorable treatment on his own case. *Id.*

19 Respondents argue that Recktenwald failed to present these claims as federal
20 constitutional violations on direct appeal (ECF No. 99, pp. 6-7). Recktenwald responds
21 that he argued that the cumulative effect of these errors deprived him of a fair trial (ECF
22 No. 102, p. 15). However, the case law is clear that merely referencing the general
23 principle of a fair trial is insufficient to present a federal constitutional claim to the state
24 court. *Hiivala*, 195 F.3d at 1106. With respect to the admission of the preliminary
25 hearing transcript, Recktenwald argues that in his reply brief to the Nevada Supreme
26 Court he cited to *United States v. Eyster*, 948 F.2d 1196, 1205 (11th Cir. 1991), which
27 relies in part on the Fifth and Fourteenth Amendments (ECF No. 102, pp. 17-18). He
28

1 claims that this reference was sufficient to apprise the Nevada Supreme Court of the
2 federal constitutional nature of this portion of ground 2. The Nevada Supreme Court
3 considered this state-law claim and held that the portions of the transcript admitted by
4 the state were properly admitted under state law—NRS 47.120(1). This court disagrees
5 that the Nevada Supreme Court was fairly presented with this claim as a federal
6 constitutional claim. Therefore, the entirety of ground 2 is unexhausted.

7
8 **Ground 5**

9 Recktenwald contends that the prosecutor committed misconduct in violation of his
10 Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial (ECF No.
11 98, pp. 20-22). Recktenwald asserts that prosecutor Kirk Vitto personally heard M.H.
12 recant her testimony in a telephone call to the district attorney's office and immediately
13 following her preliminary hearing testimony. He also argues that the prosecutor
14 repeatedly misrepresented the law, vouched for M.H.'s truthfulness, belittled the
15 defense, and made victim impact statements during closing arguments. *Id.*
16 Respondents argue that Recktenwald did not raise this claim as a Sixth Amendment
17 violation in his direct appeal (ECF No. 99, p. 8). In his opposition to the motion to
18 dismiss, Recktenwald fails to demonstrate that he raised the claim as a Sixth
19 Amendment violation on direct appeal (see ECF No. 102, pp. 21-23). Accordingly, the
20 Sixth Amendment claim in ground 5 is unexhausted. The remainder of ground 5 is
21 exhausted. See exh. 126, pp. 18-21.

22 **Ground 6**

23 Recktenwald claims that the trial court erred by not granting his motion for new trial
24 based upon juror misconduct, in violation of the Fifth, Sixth and Fourteenth
25 Amendments (ECF No. 98, pp. 23-24).

26 Respondents contend that Recktenwald failed to raise this claim as a federal
27 constitutional claim in his direct appeal (ECF No. 99, p. 8). Recktenwald argues that he
28 cited to *Canada v. State*, 944 P.2d 781 (Nev. 1977), which he contends is predicated on

1 federal constitutional principles (ECF No. 102, pp. 23-24). Having carefully reviewed
2 the state-court record, this court concludes that the claims in federal ground 6 were not
3 fairly presented as federal constitutional claims in Recktenwald's direct appeal.

4 According, ground 6 is unexhausted.

5 **Ground 8**

6 Recktenwald alleges the prosecutor failed to disclose material exculpatory evidence
7 and presented false evidence at trial in violation of his Fifth and Fourteenth Amendment
8 due process and fair trial rights (ECF No. 98, pp. 39-40). He alleges that prosecutor
9 Vitto coerced Marker and Hoadley to testify falsely and that M.H. told Vitto she had
10 testified falsely. He also claims that Vitto failed to disclose the terms of the plea deals of
11 witnesses Moore, Dunn and Coleman.

12 Respondents argue that Recktenwald raised these claims only as ineffective
13 assistance of counsel for failure to object (ECF No. 99, pp. 13-14).

14 Having carefully reviewed Recktenwald's direct appeal and state postconviction
15 litigation, this court concludes that Recktenwald presented on direct appeal the claim
16 that the victim told the prosecutor that she had lied at the preliminary hearing but the
17 prosecutor failed to disclose that material exculpatory evidence and presented false
18 evidence at trial in violation of his Fifth and Fourteenth Amendment due process and fair
19 trial rights. See exh. 126, pp. 18-19. The remaining claims raised in federal ground 8
20 are unexhausted.

21 **Ground 9**

22 Recktenwald alleges ineffective assistance of appellate counsel for failing to raise on
23 appeal the grounds set forth in federal grounds 7 and 8 (ECF No. 98, p. 41).

24 Respondents are correct that Recktenwald did not raise any claims of ineffective
25 assistance of appellate counsel with the Nevada Supreme Court. See exhs. 259, 273.
26 Therefore, ground 9 is unexhausted.
27
28

1 **b. Procedural Default**

2 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act
3 (AEDPA), provides that this court may grant habeas relief if the relevant state court
4 decision was either: (1) contrary to clearly established federal law, as determined by
5 the Supreme Court; or (2) involved an unreasonable application of clearly established
6 federal law as determined by the Supreme Court.

7 “Procedural default” refers to the situation where a petitioner in fact presented a
8 claim to the state courts but the state courts disposed of the claim on procedural
9 grounds, instead of on the merits. A federal court will not review a claim for habeas
10 corpus relief if the decision of the state court regarding that claim rested on a state law
11 ground that is independent of the federal question and adequate to support the
12 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

13 The *Coleman* Court explained the effect of a procedural default:

14 In all cases in which a state prisoner has defaulted his federal claims in
15 state court pursuant to an independent and adequate state procedural
16 rule, federal habeas review of the claims is barred unless the prisoner can
17 demonstrate cause for the default and actual prejudice as a result of the
18 alleged violation of federal law, or demonstrate that failure to consider the
19 claims will result in a fundamental miscarriage of justice.

20 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The
21 procedural default doctrine ensures that the state’s interest in correcting its own
22 mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d
23 1039, 1046 (9th Cir. 2003).

24 To demonstrate cause for a procedural default, the petitioner must be able to “show
25 that some objective factor external to the defense impeded” his efforts to comply with
26 the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to
27 exist, the external impediment must have prevented the petitioner from raising the
28 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

1 To demonstrate a fundamental miscarriage of justice, a petitioner must show the
2 constitutional error complained of probably resulted in the conviction of an actually
3 innocent person. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). “[A]ctual
4 innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United*
5 *States*, 523 U.S. 614, 623 (1998). This is a narrow exception, and it is reserved for
6 extraordinary cases only. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Bare
7 allegations unsupplemented by evidence do not tend to establish actual innocence
8 sufficient to overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750
9 (9th Cir. 1992).

10 c. Anticipatory Default

11 Recktenwald argues that if the federal grounds discussed above are unexhausted,
12 this court should deem the claims technically exhausted but apply “anticipatory default.”
13 He asserts that if he returned to the state courts with these federal grounds they would
14 be defaulted as untimely and successive. See 28 U.S.C. §2254(b)(1)(B). “A federal
15 court may not grant habeas relief to a state prisoner unless he has properly exhausted
16 his remedies in state court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014)
17 (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). “An unexhausted claim will
18 be procedurally defaulted, if state procedural rules would now bar the petitioner from
19 bringing the claim in state court.” *Id.* “A prisoner may obtain federal review of a
20 defaulted claim by showing cause for the default and prejudice from a violation of
21 federal law.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1316 (2012) (citing *Coleman v.*
22 *Thompson*, 501 U.S. at 750)).

23 Recktenwald presented the claims in federal grounds 1, 2 and 6 to the Nevada
24 Supreme Court, but he presented them as state-law claims only. Most of ground 8 was
25 never presented to the Nevada Supreme Court. He did not present the Sixth
26 Amendment claim in ground 5 to the Nevada Supreme Court. Thus, the court agrees
27 that it is likely that if Recktenwald returned to state court and presented these grounds
28

1 as federal constitutional claims, the courts would find these claims procedurally barred
2 as untimely and successive.

3 Recktenwald next contends that he can demonstrate cause and prejudice to
4 overcome the procedural bar. He asserts that ineffective assistance of appellate
5 counsel is the cause of his failure to raise these claims or to raise them in the state
6 courts as federal constitutional claims (ECF No. 102, pp. 51-52). This argument is
7 unavailing, however, because, as discussed above, Recktenwald has not raised any
8 claim of ineffective assistance of appellate counsel to the Nevada Supreme Court (see
9 discussion of federal ground 9, above). The ineffective assistance of appellate counsel
10 claim must be presented to the highest state court as an independent claim before it
11 may be used to establish cause for procedural default. *Edwards v. Carpenter*, 529 U.S.
12 446, 452 (2000). Thus, applying anticipatory default, the court concludes that grounds
13 1, 2, 6, most of ground 8 (see above) and the Sixth Amendment claim in ground 5 are
14 dismissed as procedurally barred.

15 As will be discussed below, in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the
16 Supreme Court held that the lack of postconviction counsel or the ineffective assistance
17 of postconviction counsel may provide cause to excuse the procedural default of an
18 ineffective assistance of trial counsel claim. However, the Supreme Court recently held
19 that *Martinez* does not extend to a claim of ineffective assistance of appellate counsel.
20 *Davila v. Davis*, 137 S. Ct. 2058, 2065 (June 26, 2017). Accordingly, this court deems
21 ground 9 technically exhausted/anticipatorily defaulted and subject to dismissal as
22 procedurally barred.

23 **d. Claims of Ineffective Assistance of Trial Counsel**

24 **Ground 7**

25 Recktenwald sets forth fourteen claims of ineffective assistance of trial counsel in
26 violation of his Sixth and Fourteenth Amendment rights (ECF No. 98, pp. 24-39).
27 Respondents argue that several subparts are unexhausted.
28

1 **Ground 7(A)**

2 Recktenwald alleges counsel failed to investigate and present exculpatory testimony
3 from Angelique Marker, Jennifer Hoadley, and Terri Miller (ECF No. 98, pp. 24-26).
4 Respondents argue that, while Recktenwald presented parts of this claim to the Nevada
5 Supreme Court, he has added factual allegations regarding Hoadley and Miller that
6 render this federal claim unexhausted (ECF No. 99, pp. 9-10). The court has carefully
7 reviewed Recktenwald's appeal of the denial of his state postconviction petition and
8 concludes that he has not presented any additional factual allegations with respect to
9 Hoadley that fundamentally alter the claims. See, e.g., *Vasquez v. Hillery*, 474 U.S.
10 254, 257-258, 260 (1986); *Beaty v. Stewart*, 303 F.3d 975, 989-990 (9th Cir. 2002).
11 However, Recktenwald presents here different factual allegations regarding Miller. See
12 exh. 259, p. 8. The claims regarding Miller in ground 7(A) are unexhausted.

13 **Ground 7(B)**

14 Recktenwald argues that his counsel was ineffective for failing to move to exclude
15 the testimony of the victim, M.H. and for failing to effectively impeach her testimony
16 (ECF No. 98, pp. 26-28). Recktenwald specifically alleges that M.H. indicated in a note
17 that her accusations against Recktenwald were false; she informed the prosecutor that
18 she lied at the preliminary hearing, including about watching television at Recktenwald's
19 home because there was no power at the home at that time; she told defense counsel
20 Gensler that Marker lied when she accused Recktenwald at the preliminary hearing;
21 Gensler filed a motion to withdraw from the case and to disqualify the District Attorney's
22 Office; and when Gensler transferred the case to new defense counsel, he wrote
23 counsel a letter discussing his prior conversations with M.H. and offering his help.
24 However, defense counsel failed to call Gensler as a trial witness and failed to introduce
25 evidence to contradict M.H.'s version of events (ECF No. 98, pp. 27-28).

26 Recktenwald argued the following in his appeal of the denial of his state
27 postconviction petition to the Nevada Supreme Court: trial counsel was ineffective for
28

1 failing to move to exclude the testimony of M.H. on the grounds that she had previously
2 admitted her accusations were false; and for failing to impeach M.H. when defense
3 counsel was aware that M.H. told the prosecutor and had written in a note that she had
4 lied at the preliminary hearing, including about watching television at Recktenwald's
5 home because there was no power at the home at that time. Exh. 259, p. 11; exh. 273,
6 p. 2. This is the only portion of ground 7(B) that is exhausted; the remaining claims in
7 7(B) are unexhausted.²

8 **Ground 7(C)**

9 Recktenwald alleges counsel failed to investigate and effectively challenge the
10 testimony of state expert witness Dr. Elizabeth Ritchitt (ECF No. 98, pp. 28-29).
11 Secondly, Recktenwald argues that counsel failed to obtain medical records
12 demonstrating that Recktenwald had difficulty having an erection. *Id.* Respondents are
13 correct that this second portion of ground 7(C) is unexhausted. See exh. 259, p. 10.
14 The first portion is exhausted. *Id.*

15 **Ground 7(E)**

16 Recktenwald alleges counsel failed to impeach witness Michael Dunn—who testified
17 that he had seen Recktenwald provide M.H. with drugs and had seen the two in the
18 same bed—with Dunn's plea deal in an unlawful possession of a controlled substance
19 case (ECF No. 98, p. 30). Respondents are correct that Recktenwald failed to present
20 this claim to the Nevada Supreme Court (ECF No. 99, p. 11; see exh. 259). Ground
21 7(E), therefore, is unexhausted.

22 **Ground 7(H)**

23 Recktenwald contends counsel was ineffective for bringing out Recktenwald's prior
24 convictions on the cross-examination of Debra Coleman (ECF No. 98, pp. 33-34).
25 Respondents argue that Recktenwald presents for the first time the factual allegations
26

27 ² To the extent that Recktenwald argues that any portions of ground 7(B) were exhausted through a
28 document attached to the appendix, this argument is unavailing. See *Castillo v. McFadden*, 399 F.3d 993,
999-1000 (9th Cir. 2005) ("To exhaust this claim, Castillo must have presented his federal, constitutional
issue before the Arizona Court of Appeals within the four corners of his appellate briefing.").

1 that counsel failed to object o or strike Coleman's answer and failed to seek a mistrial
2 based on the statement (ECF No. 98, p. 34). The court is not persuaded; Recktenwald
3 has not fundamentally altered the claim he presented to the Nevada Supreme Court.
4 See exh. 259, p.14. Accordingly, ground 7(H) is exhausted.

5 **Ground 7(I)**

6 Recktenwald asserts that counsel was ineffective regarding jury instructions on
7 transition (regarding sexual assault versus statutory sexual seduction) and on addict-
8 informant witnesses (ECF No. 98, pp. 34-36). Recktenwald acknowledges that he did
9 not present a claim regarding a jury instruction on addict-informant witnesses (ECF No.
10 102, p. 36). Therefore, only the claim regarding the jury instruction on transition is
11 exhausted.

12 **Ground 7(J)**

13 Recktenwald alleges that his counsel was ineffective for failing to object to
14 Recktenwald's sentencing under both the statutory and habitual offender statutes and
15 for failing to have Recktenwald's son testify on his behalf at sentencing (ECF No. 98,
16 pp. 36-37).

17 Recktenwald now acknowledges that the following portion of this claim was not
18 presented to the Nevada Supreme Court: that his counsel failed to object to numerous
19 improper comments by the prosecution at sentencing and failed to object at that time
20 that the sentences imposed were cruel and unusual in violation of the Eighth
21 Amendment (ECF No. 98, pp. 36-37; ECF No. 102, p. 37). Thus, that portion is
22 unexhausted. The portion regarding Recktenwald's son is exhausted.

23 **Ground 7(L)**

24 Recktenwald alleges counsel was ineffective for failing to seek dismissal of the
25 indictments because they failed to provide Recktenwald with adequate notice (ECF No.
26 98, p. 38). Petitioner acknowledges that he did not present this claim to the Nevada
27 Supreme Court (ECF No. 102, pp. 37-38). Therefore, ground 7(L) is unexhausted.
28

1 Petitioner argues that the court should deem any unexhausted claims in ground 7 as
2 technically exhausted/anticipatorily defaulted because if he presented these claims to
3 the Nevada Supreme Court now, the Nevada Supreme Court would find the claims
4 procedurally defaulted (ECF No. 102, p. 35). Recktenwald asserts that he can
5 demonstrate cause and prejudice under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) (ECF
6 No. 102, p. 44).

7 In *Martinez v. Ryan*, the Supreme Court held:

8
9 [W]hen a State requires a prisoner to raise an ineffective-assistance-of-
10 trial-counsel claim in a collateral proceeding, a prisoner may establish
11 cause for a default of an ineffective-assistance claim in two
12 circumstances. The first is where the state courts did not appoint counsel
13 in the initial-review collateral proceeding for a claim of ineffective
14 assistance at trial. The second is where appointed counsel in the initial-
15 review collateral proceeding, where the claim should have been raised,
16 was ineffective under the standards of *Strickland v. Washington*, 466 U.S.
668 (1984). To overcome the default, a prisoner must also demonstrate
that the underlying ineffective-assistance-of-trial-counsel claim is a
substantial one, which is to say that the prisoner must demonstrate that
the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003)
(describing standards for certificates of appealability to issue).

17 132 S.Ct. at 1318-19. In *Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013), the Supreme
18 Court applied *Martinez* to procedurally defaulted claims of ineffective assistance of trial
19 counsel in states that technically permit a person to raise an ineffective assistance claim
20 on direct appeal but actually provide no meaningful opportunity to develop the claim. As
21 discussed earlier in this order, in *Davila v. Davis*, 137 S.Ct. 2058, 2065 (June 26, 2017),
22 however, the Supreme Court held that *Martinez* does not extend to procedurally
23 defaulted claims of ineffective assistance of appellate counsel.

24 In Nevada, a person is generally required to raise claims of ineffective assistance
25 of counsel in state court through a post-conviction habeas corpus petition unless the
26 state district court had developed the facts of the claim before the filing of the direct
27 appeal. *Gibbons v. State*, 634 P.2d 1214, 1216 (Nev. 1981). The Nevada Supreme
28 Court has declined to follow *Martinez* and does not permit ineffective assistance of post-

conviction counsel to constitute good cause to excuse the procedural bars under NRS §§ 34.726, 34.810.³ *Brown v. McDaniel*, 331 P.3d 867, 869 (Nev. 2014).

If Recktenwald returned to state court to raise these claims for the first time, the Nevada Supreme Court would dismiss the petition because it would be successive and outside the one-year time limit to file a petition. Additionally, in Nevada, the ineffective assistance of post-conviction counsel does not constitute good cause to excuse the procedural bars. As such, the court finds that the unexhausted claims in ground 7 are technically exhausted and procedurally barred.

To establish “cause” to overcome procedural default under *Martinez*, a petitioner must show: (1) the underlying ineffective assistance of appellate claim is “substantial”; (2) the petitioner was not represented or had ineffective counsel during the post-conviction review proceeding; (3) the state post-conviction review proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Trevino v. Thaler*, 133 S.Ct. at 1918.

In this case, Recktenwald establishes the third and fourth requirements because Nevada law requires a petitioner to bring such claims in a post-conviction proceeding. However, because the determination of whether Recktenwald satisfies the first and second requirements are intertwined with the merits of ground 7, the court will defer ruling on the cause and prejudice issue until the merits of ground 7 are briefed in respondents’ answer and Recktenwald’s reply brief.

e. Fourth Amendment Claim and *Stone v. Powell*

Independent, substantive Fourth Amendment claims are generally barred from federal habeas review. In *Stone v. Powell*, the United States Supreme Court held that

³ Pursuant to NRS § 34.726(1), a petition that challenges the validity of a judgment or sentence must be filed within one year after entry of the judgment of conviction or within one year after the appellate court issues its remittitur unless there is good cause for the delay. Pursuant to NRS § 34.810(2), (3), a judge must dismiss a second or successive petition if the petition fails to demonstrate good cause for the petitioner’s failure to present the claim in the original petition.

1 allegations of violations of a petitioner's Fourth Amendment rights are not cognizable in
2 federal habeas corpus actions provided that the petitioner has a "full and fair"
3 opportunity to litigate these claims in state court. *Stone v. Powell*, 428 U.S. 465, 481
4 (1976); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). To be eligible for
5 habeas relief on Fourth Amendment claims, a petitioner must demonstrate that the state
6 court has not afforded him a full and fair hearing on those claims. *Stone*, 428 U.S. at
7 494 n.37.

8 **Ground 3**

9 Recktenwald alleges that the trial court erroneously denied his motion to suppress
10 regarding a violation of his right against unreasonable search and seizure, in violation of
11 his rights under the Fourth, Fifth and Fourteenth Amendments (ECF No. 98, p. 18).
12 This is, in fact, a Fourth Amendment claim, and Recktenwald presented it as such to the
13 Nevada Supreme Court on direct appeal. See exh. 126. He now disputes that he had a
14 "full and fair" opportunity to litigate this claim because, while he filed a counseled motion
15 to suppress and the state responded, the trial court denied the motion without a hearing.
16 See exhs. 55, 56, 112. However, as the Nevada Supreme Court observed,
17 Recktenwald has not cited to case law that supports his contention that the trial court
18 was required to hold a hearing on the motion to suppress. He has not demonstrated
19 that he was denied a full and fair opportunity to litigate the motion to suppress.
20 Accordingly, ground 3 is dismissed as noncognizable in federal habeas corpus.

21 **III. Conclusion**

22 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 99)
23 is **GRANTED** in part as follows:

24 Grounds 1, 2, 6, and 9 are dismissed as procedurally barred.

25 The Sixth Amendment claim in ground 5 is dismissed as procedurally barred.

26 The following portion of ground 8 is exhausted and ready for merits disposition:
27 the claim that the victim told the prosecutor that she had lied at the preliminary hearing
28

1 but the prosecutor failed to disclose that material exculpatory evidence and presented
2 false evidence at trial in violation of his Fifth and Fourteenth Amendment due process
3 and fair trial rights. All other claims in ground 8 are dismissed as procedurally barred.

4 Ground 3 is dismissed as noncognizable.

5 A decision on any subparts of ground 7 is deferred to the merits disposition.

6 **IT IS FURTHER ORDERED** that petitioner's motion for leave to file excess pages
7 (ECF No. 104) is **GRANTED**.

8 **IT IS FURTHER ORDERED** that respondents' motion for leave to file excess
9 pages (ECF No. 106) is **GRANTED**.

10 **IT IS FURTHER ORDERED** that respondents shall have **forty-five (45) days** to
11 file an answer to the remaining grounds in the petition.

12 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** after the
13 date of service of the answer in which to file the reply in support of the petition.

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16 DATED: 22 August 2017.

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18 **ROBERT C. JONES**
19 **UNITED STATES DISTRICT JUDGE**
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